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Supreme Court of the United States

OCTOBER TERM, 1962

No. 38

POLAR ICE CREAM & CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Appellees.

MOTION TO AFFIRM

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INDEX

	Page
MOTION TO AFFIRM	3
STATEMENT	3
ARGUMENT	5
PROOF OF SERVICE	9

CITATIONS

Cases

Anniston Mfg. Co. v. Davis 301, U.S. 337	7
Baldwin v. Seelig, 294 U.S. 511, 79 L.Ed. 1032	5, 7
Borden Company v. Odham, 121 So. 2nd 625	5
Champlin Ref. Co. v. Corporation Comm., 286 U.S. 210	7
Crowell v. Benson, 285 U.S. 22	7
Highland Farms Dairy, Inc. v. Agnew, et al, 300 U.S. 608	6
Milk Control Board of the Commonwealth, Board of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346	5
Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469	5
Shivet v. Lee, 89 So. 2nd 318	5
Texas Co. v. Brown, 258 U.S. 466, 67 L.Ed. 721	7
U.S. v. Lee, 13 So. 2nd 919	8
U.S.-Pure Oil Co. v. State of Minnesota, 63 L.Ed. 180	8

CITATIONS—(Continued):

Page

The Constitution of the United States

Article I, Section 8, Clause 17 7

Article VI, Clause 2 (Supremacy Clause) 7

Statutes

Armed Services Procurement Act of 1947, 62 Stat. 22, 10 U.S.C. Sect. 2301, et seq. 7

Title 28, U.S.C. 2284 4

Title 28, U.S.C. 2325 4

Florida Statutes:

Chapter 501, Florida Statutes, 1961 ..... 4, 5, 7

Section 501.13(8) 5

Section 501.20 4

Section 501.09(8) 7

Section 501.09(4) 8

Texts

1956 Op. Atty. General of Florida, 056-43, Feb. 16, 1956 8

Corpus Juris Secundum, Vol. 15, page 58 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 601

POLAR ICE CREAM & CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Appellees.

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the Ditsrict Court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on July 26, 1962, by a district court of three judges

specially constituted pursuant to 28 U.S.C. §§2284 and 2325, denying the relief sought by Appellant's complaint which sought to set aside a number of orders, rules and regulations promulgated by the Appellee, Florida Milk Commission.

The Pensacola Milk Marketing Area, which is one of five areas under the jurisdiction of Appellee, came under the control of the Appellee on November 21, 1961, after a favorable vote by the producers and producer-distributors of that area as prescribed by Section 501.20, Florida Statutes.

Immediately after acquisition of control of this area by the Appellee, the Appellant retro-actively slashed prices to its producers from $.61 per gallon to $.56 per gallon to $.43 per gallon. Thereafter, the Appellee passed a number of orders having to do with the classification of milk, minimum prices for the sale of milk, base percentage for producers, and other administrative details for fixing and maintaining a fixed price for milk. These rules and orders are the same that exist in the other milk marketing areas.

While violating all these rules and regulations, the Appellant alleged hardship and oppression resulting from control by the Appellee and brought this action even though the Record shows that Appellant candidly admitted that it was regularly purchasing milk from the same identical "base earned producers" for $.61 per gallon during the years that the Appellee exercised no control in that area.

Appellants brought this action in the United States District Court for the Northern District of Florida, seeking to have all the rules and regulations of the Appellee set aside as unconstitutional and seeking to have Chapter 501, Florida Statutes, declared unconstitutional. The District Court denied Appellant any relief and upheld Appellee's rules and regulations and Chapter 501, Florida Statutes, as being constitutional and valid.

ARGUMENT

The decision of the District Court is plainly correct. Chapter 501, Florida Statutes, has been upheld many times as constitutional and not in violation of the Commerce Clause, Due Process and Equal Protection of the Law under the United States Constitution.

As the supreme court of Florida stated in the leading case of Borden Company v. Odham, 121 So. 2nd 625:

> "These powers to supervise and regulate the milk business in Florida are common to those regulating the milk business in other states and have been upheld as proper exercises if not done in an arbitrary and unreasonable manner. The transportation business and other businesses are similarly regulated. *Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 Lawyers' Edition 940 and Shiver v. Lee, supra.*"

Needles to say, this Court has upheld legislation like Chapter 501, Florida Statutes, many times beginning with the landmark in this field of Nebbia v. New York, 291 U.S. 50, 78 L. Ed. 940.

As the District Court said, the Appellant relies most heavily upon the case of Baldwin v. Seelig, 294 U.S. 511, for the proposition that Section 501.13(8), Florida Statutes, is unconstitutional as a restraint on interstate commerce. The Court clearly distinguished the Baldwin case with the case at Bar as this Honorable Court distinguished the Baldwin case with the case of Milk Control Board of the Commonwealth Board of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346. In upholding the constitutionality of Pennsylvania's "milk laws", this Court made some observations in Eisenberg that are particularly appropriate to this cause:

> "The respondent maintains a receiving station in Penn-

sylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York.

"If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable."

Thus, the Baldwin case is of no significance here because, as the District Court demonstrated, the facts in this case are not at all the same as the facts in that case because Appellee has not attempted in any way to regulate the price of milk in another state. The District Court, therefore, properly refused to consider or render an opinion on a hypothetical set of facts as Appellant would have it do and is now attempting to have this Honorable Court do.

Another case which is controlling upon the constitutional questions is Highland Farms Dairy, Inc., v. Agnew et al, 300 U.S. 608.

In short, the cases are legion upholding the constitutionality of such regulatory acts and the Appellant, as the District Court said, has failed to sustain the burden of proof that there has been an illegal application of Appellee's power to establish minimum prices upon Appellant.

The Appellant, in its Jurisdictional Statement, is inaccurate in representing to this Court that Appellee requires Appellant to pay a fixed price of $.61 per gallon for milk it sells to federal military installations in violation of the Federal Procurement Statutes and Article VI, Section 2, of the United States Constitution. Nowhere in Chapter 501, Florida Statutes, is there any control attempted of this nature. Appellee has no order now or at the time when the District Court heard this cause which remotely regulates the price of "military milk" in any possible way. This would appear to be an attempt by Appellant to bring a hypothetical situation before this Court which we respectfully suggest should not be entertained. Crowell v. Benson, 285 U.S. 22; Champlin Ref. Co. v. Corporation Comm., 286 U.S. 210; Anniston Mfg. Co. v. Davis, 301 U.S. 337. The District Court properly found the foregoing to be correct from the testimony.

Appellants attempt to show that the regulatory fee imposed on milk distributed by Appellant to military installations is a tax imposed by the State of Florida on the United States and thus violates the Supremacy Clause, Article I, Section 8, Clause 17 of the U. S. Constitution is wholly without merit.

This Honorable Court has held in Texas Co. v. Brown, 258 U. S. 466, and Baldwin v. Seelig, 294 U. S. 511, that a regulatory fee may only be attacked if it is so excessive as to constitute a tax for revenue purposes and thus impose a burden on interstate commerce. This regulatory fee *cannot* possibly constitute a tax for revenue.

As the District Court held, this regulatory fee is based upon the privilege of doing business in the State of Florida and not a tax upon milk and thus, does not unduly burden interstate commerce nor violate the Supremacy Clause even though Appellant delivers milk to United States military installations. Indeed, this contention is conclusively belied by Section 501.09(8), Florida Statutes, which provides:

"If at any time during a fiscal year the revenue received by the Commission under this Chapter exceed by at least twenty-five per cent (25%) the total amount of expenditures as budgeted by the Commission for that fiscal year, the payment of taxes provided for **** in 501.09(4), on milk distributed by distributors, will be discontinued **** for the calendar months remaining in that fiscal year ****."

As clearly shown by the above statute itself, the sums collected here can never reach the State's general revenue and the tax or fee abates when the inspection and regulation board is assured of sufficient funds for that purpose. This question has been answered by the Attorney General of Florida in Opinion No. 056-43, February 16, 1956. A very similar situation was also present in U. S. v. Lee, 13 So. 2nd 919, where a similar regulatory fee on gas dealers was upheld as being constitutional.

Thus, it is clear that this tax is upon a regulated licensee and not upon the United States. It is also clear that the funds are to be used solely for the purpose of inspecting and regulating this critical industry and not to raise revenue. Corpus Juris Secundum, Vol. 15, page 58, states:

"As an incident to its power to make valid inspection laws, a state may charge a fee reasonably sufficient to meet the expenses of the inspection and such a fee is not properly assailable as a burden on interstate commerce."

As an authority for this comment, U. S. Pure Oil Company v. State of Minnesota, 63 Lawyers' Edition 180 is cited.

Appellees respectfully submit, therefore, that the Appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Richard W. Ervin
Attorney General, State of Florida

Joseph C. Jacobs
Assistant Attorney General

PROOF OF SERVICE

I, JOSEPH C. JACOBS, one of the attorneys for the FLORIDA MILK COMMISSION, and CHARLES O. ANDREWS, JR., et al, Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of January, 1963, I served a copy of the foregoing Motion to Affirm, on the several parties hereto by mailing a copy in a duly addressed envelope, air mail, postage prepaid, to their respective attorneys of record, as follows: JOE J. HARRELL, of Jones and Harrell, 201 East Government Street, Pensacola, Florida, and J. A. McCLAIN, JR., Suite 615, Marine Bank Building, Tampa, Florida, Attorneys for Polar Ice Cream and Creamery Company, Pensacola, Florida.

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